REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CRIMINAL REVISION NO 13 OF 2019

PROF MUHAMMAD ABDALLA SWAZURI .....1ST ACCUSED

EMMA MUTHONI NJOGU.....2ND ACCUSED

TOM AZIZ CHAVANGI.....3RD ACCUSED

DR. SALOME LUDENYI MUNUBI.....4TH ACCUSED

JOASH OINDO MOGAMBI.....5TH ACCUSED

LILIAN SAVAI KEVERENGE.....6TH ACCUSED

FRANCIS KARIMI MUGO.....7TH ACCUSED

CATHERINE WANJIRU CHEGE.....8TH ACCUSED

JANE WANJIKU GICHIGI.....9TH ACCUSED

KEVIN OINDO MOGAMBI.....10TH ACCUSED

SUNSIDE GUEST HOUSE LTD..... 11TH ACCUSED

SAMUEL RUGONGO MUTURI.....12TH ACCUSED

EVAHMARY WACHERA GATHONDU.....13TH ACCUSED

MICHAEL GEORGE ONYANGO OLOO.....14TH ACCUSED

GODFREY RUBIA MURITU.....15TH ACCUSED

SOSTENAH OGERO TARACHA.....16TH ACCUSED

SHAKIL AHMED KHAN.....17TH ACCUSED

NAZIR AHMED MATABKHAN.....18TH ACCUSED

TORNADO CARRIERS LIMITED.....19TH ACCUSED

FRANCIS KIBARU KARANJA.....20TH ACCUSED

MARTHA WAIRIMU WAITHAKA..... 21ST ACCUSED

JOHN KAMAU MWANGI.....22ND ACCUSED

PHILIP KILEIYA SEIYANDUKI.....23RD ACCUSED

BETHA WANGITHI MUTHIKE.....24TH ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

(From the ruling of the Chief Magistrate (Hon. L. N. Mugambi) in ACEC No. 6 of 2019 dated 23rd April 2019)

RULING

1. Eleven (11) of the accused persons named in this matter have been charged with offences under the provisions of the Anti-corruption and Economic Crimes Act. The charges comprise various counts in **Chief Magistrates ACEC No. 6 of 2019**. These counts include corruption and economic crimes, abuse of office, unlawful acquisition of public property and dealing with suspect property. The applicants are also together charged with the offence of conspiracy to commit an act of fraud that led to an irregular payment of Kshs. 109,769,363.00. They pleaded not guilty to the offences and thereafter applied for bail and bond before the Chief Magistrate, Hon. L. N. Mugambi.

2. In his ruling dated 23rd April 2019, the trial court categorised the accused persons in four groups and set bail and bond terms for them as follows:

> **Group 1**- comprising those accused persons who were facing charges in count 1 as well as additional counts in which the subject matter is above 50,0000,000/-. These accused persons, namely the 1st accused, Mohammad Abdalla Swazuri, the 2nd accused, Emma Muthoni Njogu; the 3rd accused, Tom Aziz Chavangi; the 4th accused, Salome Ludenyi Munubi; the 7th accused, Francis Karimi Mugo and the 8th accused, Catherine Wanjiru Chege, were required to deposit a cash bail of Kshs. 12, 000,000 (twelve million) and in the alternative, a bond of Kshs. 30,000,000 (thirty million) plus a surety of a like amount.
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> **Group 2** comprised persons facing charges in count 1 as well as additional count (s) in which the subject matter of the charge is in excess of Kshs. 15,000,000. This group comprised the 12th accused, Samuel Rugongo Muturi. He was required to deposit a cash bail of Kshs. 6,000,000 (six million) and in the alternative, a bond of Kshs. 15,000,000 (fifteen million shillings) plus a surety of a like amount.
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> **Group 3** had the accused persons facing charges in count 1 as well as additional counts in which the value of the subject matter of the charge (s) is above 5,000,000. The accused in this category was the 16th accused, Sostenah Ogero Taracha. His terms of bail were to deposit a cash bail of Kshs. 3,000,000 (three million shillings) and in the alternative bond of Kshs. 10,000,000 (ten million) plus a surety of a like amount.
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> **Group 4** comprised accused persons facing charges either in count 1 only or with an additional count (s) in which the value of the subject matter of the charge is below 5,000,000/-. This group comprised the 6th accused, Lilian Savai Keverenge; the 13th accused, Evahmary Wachera Gathondu; and the 14th accused, Michael George Onyango Oloo. The court ordered that these accused persons may be released on a cash bail of Kshs. 1,500,000 (One million five hundred thousand) or in the alternative a bond of Kshs. 5,000,000 (five million) plus a surety of a like amount.

3. The court further directed that the accused persons shall deposit their passports in court, shall not contact any witnesses, and every accused person who is a holder of a public office is barred from accessing the office without prior written authorization of the current head of the respective organization, the authorization to be made after consultation with the Investigative Agency.

4. Dissatisfied with the ruling of the court, the applicants filed the present application which is dated 23rd April in which they ask this court to revise and set aside the decision of the trial court. The application is supported by an affidavit sworn by the 1st applicant, Prof. Muhammad Abdalla Swazuri. Learned Counsel, Mr. Kithi, submitted that while the application was supported only by an affidavit sworn by the 1st applicant, the application was representative as all the applicants were dissatisfied with the decision of the trial court. The 1st applicant, Prof. Swazuri had consolidated all the issues that the applicants wished to raise as deposed at paragraph 1 of his affidavit.

5. Mr. Monda for the DPP argued that the application that his office had been served with related only to the 1st applicant. He noted that the trial court had divided the accused persons into categories, and that the 1st applicant was in category 1 in the ruling of the trial court. He could therefore not make any depositions in respect of the other applicants. I directed the DPP to raise his objections with respect to Mr. Swazuri's depositions in his response to the application.

6. The applicants argue that the trial court imposed unjust and unreasonable bail and bond terms that contravene Article 49 of the Constitution. They urge the court to revise the decision of the court and issue reasonable bail or bond terms.

7. In written submissions dated 23rd April 2019 filed on behalf of the applicants and highlighted at the hearing of the application, Mr. Kithi argued that the applicants had a legitimate expectation with respect to the administration of justice. He contended that the doctrine of precedence creates legitimate expectations in society and is therefore a core expectation in a democratic society on how citizens should relate to each other. That this doctrine derives from the Constitution, which creates a court system in which the decision of a higher court is binding on a lower court. It was his submission that the expectation would be that lower courts discharge themselves pursuant to the decisions of higher courts, and for them to fail to do that would create a chaotic environment.

8. According to Mr. Kithi, the lower court's discretion to set bail and bond terms is not completely unfettered. Rather, it is guided by the principles which are familiar to all and the trends set by the higher courts.

9. Mr. Kithi referred the court to a comparative analysis of the bail and bond terms and the trends set by the courts with respect thereto. It was his submission that setting the bond terms has to be constitutional and legal, and that it is not an emotional decision.

10. Counsel further submitted that the trial court had, in setting the bail terms in respect of the applicants in this case, departed from the normal principles for setting bond terms in this jurisdiction. Instead, it had imported extra judicial principles in arriving at its decision. In his view, what had informed the decision of the trial court were extraneous considerations unknown in law. He submitted that the trial court had not referred to any local decision to support the position taken by the trial court. He referred in this regard to what he termed as the emotional decision that anti-corruption and economic crimes are more grievous than murder. In his view, such a conclusion has no basis in our society. Counsel noted that reference was made to foreign decision to support that principle, but the court had not shown why it was bound by that decision when none of the higher courts that set precedents were bound by it.

11. The applicants further asked the court to consider the principle of public interest that the trial court had imported. His submission was that while the argument was convincing, the courts in this jurisdiction have continued to uphold the protection of accused persons. In his view, to employ the principle of public interest against accused persons is to remove the presumption of innocence. It was also his view that the quantum (in reference to the amount alleged to have been corruptly misappropriated by an accused person) is completely unrelated when setting bond terms. The fact that the issue of quantum is unrelated to the amount the amount of bail set is the reason why the applicants had filed a consolidated application.

12. It was his submission that the trial court had set categories with different bond terms and while, on the face of it, this sounded convincing, to base bail terms on the quantum was, in his view, to impute guilt on the part of the person charged. Mr. Kithi further submitted that nothing in law supports the presumption that bond terms are set exorbitantly enough to be commensurate with the allegations on the amount set out in the charge sheet.

13. It was his contention, however, that even had the quantum been a factor to consider in setting bail, the terms set by the trial court did not support this argument as a person charged with obtaining a benefit of Kshs 600,000 has been asked to deposit a cash bail of Kshs 5 million. The applicants therefore asked the court to exercise discretion and vary or alter the bond terms and set reasonable terms.

14. The respondents filed grounds of opposition which were relied on by Mr. Monda, Learned Prosecution Counsel, in opposing the application. He submitted that the bond terms imposed are reasonable given the circumstances of this case. He noted that the DPP had opposed the release of the applicants on bail, but the court had proceeded to set the bail terms.

15. It was his submission further that each case has its own peculiar circumstances and facts. He noted that the only issue that the DPP had with the decision of the trial court was that in his ruling, the trial magistrate had noted that the fact that the first three accused persons had been attending court in other cases was a relevant factor in considering what bail terms to set. Counsel referred the court to the decision of Mabeya, J in **R v Sebastian Miriti (2019) eKLR** to submit that the court did not treat attending court as a relevant factor but as a compelling reason not to grant bail. Mr. Monda asked this court to treat that factor as a compelling factor and cancel the accused's bond.

16. Mr. Monda further submitted that the court had taken into consideration various factors, among them the public interest, the bail/bond policy guidelines, and the authorities relied on by the DPP and the defence. Counsel noted that the trial court had gone an extra mile to get authorities from other jurisdictions, and he cannot be faulted for that as there was a need to enrich our jurisprudence.

17. It was also the DPP's submission that the trial court did not deal with the accused persons' bail applications 'wholesomely'. Rather, he dealt with each of them specifically, while considering each of the issues facing the accused persons. It was his submission therefore that the bail terms given by the trial court are reasonable given the peculiar circumstances of each of the accused persons.

18. Mr. Kinyanjui, who appeared with Mr. Monda for the DPP, highlighted the decision in **ACEC 12 of 2019- Reuben Marumben Lemunyete & Others vs Republic**. He observed that in an application such as is presently before this court, the court had held that each accused person's circumstances must be taken into consideration,, and that each accused person must demonstrate the difficulties he or she has had with the bond terms set by the lower court. Counsel urged the court to follow this principle and to note that the only difficulty experienced by the applicants had been captured at paragraph 9 of the supporting affidavit of Prof Swazuri. However, the applicants had not expressed the difficulties which were peculiar to them that made it difficult to comply with the decision of the lower court. He observed that in **R vs Sebastian Miriti (supra)**, Mabeya J held that the fact that an accused person has another charge and faces a similar trial constitutes a compelling reason not to grant bail.

19. Mr. Kinyanjui also referred to the decision from India relied on by the Chief Magistrate's Court, **Criminal Appeal No. 838 of 2009- Masroo Vs. State of U.P & Another,** in which the court held that it must balance the liberty of the individual and the collective interests of the public. His submission was that the trial court had struck a balance between the interests of the public and the applicants' interests, and he

urged the court to dismiss the application and enhance the bail terms by cancelling them.

20. In his submissions in reply, Mr. Okubasu, who appeared on behalf of the applicants with Mr. Kithi, among other Counsel, submitted that the core of the objection by the DPP is that the accused have other proceedings and the court should have considered this. He submitted that last year, the DPP had framed eight charges against one accused person, one Lillian Omollo, yet bail had been granted by the High Court in one of the matters to apply in all the matters. His submission was that if this bail was cancelled, it would apply to all the cases. He noted that the DPP was not saying that the accused had committed the other offences after they were charged, but that the offences were committed before the present offences. He further submitted that the accused persons were placed on half salary after they were charged in court as they were public officers, which brings in their personal circumstances.

21. With regard to the application by the DPP for the court to revise the bail terms and enhance them, he submitted that the court cannot revise the bail terms without hearing the applicants. He further submitted that the DPP should file a formal application to seek enhancement, and he urged the court to direct that the bail terms in the previous cases against the applicants should be the bail terms for the present case.

22. In further response to the DPP's submissions, Mr. Kithi submitted that the jurisdiction of the court under Article 49 of the Constitution and section 123 of the Criminal Procedure Code is to review and admit the accused to reasonable bond terms. He further submitted that the new method of the lower court to stratify the bond terms is unknown in law and is not justified on any law by the trial magistrate. He argued, further, that Article 50(2) of the Constitution, which provides for the rights of accused persons, remains a constant and cannot be breached by the trial court.

23. Mr. Kithi challenged the decision from India relied on by the DPP. He submitted that the DPP had not justified why it should be used here, and neither did the trial magistrate. According to Mr. Kithi, the decision is not a local decision, and the normal practice is to justify departure from a local decision and application of a foreign decision, noting that in this case, it had substantially influenced the setting of bond terms and fettered the discretion of the trial court. In his view, the reliance on the decision was an illegality and was unconstitutional.

Analysis and Determination

24. I have considered the submissions of the parties to this matter. I believe that four principal arguments are made against the decision of the trial court. The first is that it departed from judicial trends with respect to bail set by courts in this country. The second is that it erred by categorising the applicants into groups and setting the bail terms on the basis of those categories. The third is that it erred by considering the quantum alleged to have been misappropriated by the accused as a basis for setting the bail terms. Finally, the court's decision is criticised for relying on a decision from India in which the court considered the public interest in setting bail terms against an accused person.

25. The starting point in considering an application for bail is Article 49 of the Constitution, which I believe there is no dispute about. The constitutional principle is that every accused person is entitled to bail unless there are compelling reasons why bail should not be granted. I need not rehash the statutory provisions set out in section 123A of the Criminal Procedure Code. Suffice to say that they require the court to consider the nature and seriousness of the offence with which an accused person is charged, the character of the accused, the antecedents, associations and his record, and the strength of the evidence against him or her.

26. In **ACEC Revision No 12 of 2019- Reuben Marumben Lemunyete & Others vs Republic**, I considered at some length the factors that the court should consider in determining if, and the amount of bail or bond to set in regard to, an accused person seeking to be released on bail or bond. Starting from the principles that bail is a constitutional right, the court must consider also the personal circumstances of each accused person, so that it does not set bail that amounts to a denial of this right, and thus an infringement of the right to be presumed innocent-see **Andrew Young Otieno v Republic [2017] eKLR** in which the High Court held that the terms of bail set by the trial court should not be such that it amounts to denial of the constitutional right of the accused to be released on bail pending trial. A trial court is also entitled to give varying bail or bond terms to the accused persons before it-see **Joses Kimathi Murumua & 3 Others v Republic [2013] eKLR**.

27. The question is whether the Chief Magistrate's Court, in the ruling impugned in the present application, departed from these principles. I note that the Chief Magistrate considered the constitutional and statutory provisions which I have referred to above, as well as the provisions of the **Bail and Bond Guidelines**, noting in particular the provisions of the Guidelines at page 25 which require the court to be satisfied by the prosecution, on a balance of probability, of the existence of compelling reasons to justify the denial of bail.

28. The court also relied on the decision of Wakiaga J in **R v David Muchiri Mwangi High Court Criminal Case No. 46 of 2017** in which he cited the decision in **R vs. Mgunya (2011) EA 36** in which the court had noted what amounts to compelling reasons. One of the factors considered to constitute 'compelling reasons' in that case was **"If releasing the accused on bail public confidence in the administration of justice will be diminished."**

29. After considering the previous decisions and constitutional and statutory provisions, the Chief Magistrate found that the DPP had not satisfied him that the accused should be denied bail, and he granted the accused persons different terms of bail and bond based on the charges facing them. He imposed higher terms on those persons, such as the 1st applicant, who are facing charges involving higher amounts, and who are also facing charges in other courts.

30. Having considered the ruling of the court and the submissions of the parties with respect thereto, I take the following view. First, I believe that the Chief Magistrate directed himself properly on the principles to be considered in granting bail or bond. He took into account the constitutional and statutory provisions and judicial precedents on the issue of bond and bail. I am not satisfied therefore that the criticism of his decision on this basis is merited.

31. The court was also criticised for relying on a foreign decision in reaching his conclusion that it was necessary to consider the public interest in fostering confidence in the administration of justice in granting bail. However, I take the view that this country is a members of a

global village, and we learn from the experiences of others with jurisdictions similar to ours, and who face similar problems. Were decisions emanating from our courts revised or set aside on appeal solely on the basis that reliance was placed on decisions from other jurisdictions, a lot of groundbreaking decisions in this country on a whole range of issues would never have seen the light of day.

32. It is true that we must develop our own indigenous jurisprudence, but that does not, in my view, imply that we must eschew all learning from other jurisdictions. I am not satisfied therefore that there was an error in the trial court placing reliance on the decisions in **Nimmagadda Prad Vs. C.B. I Hyderabad, Criminal Appeal No. 728 of 2013** or **R vs. Hall (2002) 3 SCR 309** and considering the public interest principle as a factor in determining whether and what amount to grant as bail or bond.

33. In any event, as emerges from the decisions in **R v David Muchiri Mwangi and R v Mgunya (supra)**, that consideration is not entirely foreign to our jurisprudence. Whether it is sufficiently compelling to justify denying an accused person bail or bond must, however, depend on the circumstances of the case, and is yet to emerge, to my knowledge, as the primary consideration in denying an accused person bail or bond in any decision in this jurisdiction.

34. However, it would not be surprising if, for instance, a person charged with committing a particularly heinous or vicious murder, or of a particularly egregious theft of public resources, was denied bail or bond on the basis that fostering public confidence in the administration of justice was a compelling enough reason to deny bail. I am therefore not satisfied that the 'importation'- as the applicants term it, of the public interest consideration is unconstitutional or sufficient to vitiate the decision of the Chief Magistrate's Court.

35. The applicants are aggrieved that the Chief Magistrate's Court categorised the accused persons in groups, depending on the amount of the public funds they are alleged to have benefitted from. I have already observed that a court is entitled to impose varying bond or bail terms on accused persons, depending on their personal circumstances. This court did so in **ACEC 12 of 2019** in which it imposed differing terms on the applicants with respect to whom the Chief Magistrate's Court had imposed uniform terms.

36. While this court did not categorise the accused in groups or term the basis of the categorisation as 'subject matter', there is an underlying thread that the higher the amount of funds that a person is charged with misappropriating the more severe the bail or bond terms ought to be. I believe that there is a reasonable rationale for this, which emerges from a consideration of the grant of bail in other offences. While both a person charged with affray or simple assault and a person charged with murder have a constitutional right to bail, no-one would argue that the same terms should apply to them.

37. This, in my view, is in accord with the consideration of the seriousness of the charge, the likelihood of interfering with witnesses, and the likelihood of absconding and not appearing for trial. I believe this is also why additional conditions such as depositing travel documents in court, not contacting prosecution witnesses and not returning to the office where the offence was alleged to have been committed are imposed on persons charged with anti-corruption and economic crimes. One cannot rule out the possibility that where one faces several charges of corruption involving vast sums of public funds, there is a greater incentive to abscond trial. In my view therefore, there was nothing remiss in the Chief Magistrate's Court categorisation of the applicants and imposition of different bail and bond terms on them.

38. Which leaves the question whether the bond and bail terms imposed on them were unreasonable, unjust and contrary to Article 49 of the Constitution.

39. In considering this question, I bear in mind that, as submitted by Counsel for the DPP, Mr. Kinyanjui, there is nothing before the court that indicates the personal circumstances of the applicants. Prof. Swazuri avers at paragraph 9 of his affidavit in support of the application that **"The applicants consider the bail and bond terms in the aforesaid ruling to be unreasonable, unjust, exorbitant and in contravention of Article 49 of the Constitution."**

40. The applicants have cited several decisions of this court in which the court has revised the bail and bond terms imposed on applicants by the trial court. In all these cases, the applicants have been able to show that the bail and bond terms imposed on them are, due to their financial and social situations, outside their means. This was the situation in **Ferdinand Odoyo Matano & 8 others v Republic [2018] eKLR, ACEC No. 12 of 2019,** as well as **Andrew Young Otieno v Republic**, among other decisions in which the High Court has reviewed the bail terms of an accused person downwards. It is not sufficient, in my view, for an accused person to state that he or she 'considers' that the terms are unreasonable or unjust. There is a need to place their circumstances before the court for consideration.

41. I will however, consider their application for revision against the terms of bond and bail set in similar cases. In **Rodgers Nzioka & 10 others v Republic [2018] eKLR**, the court directed each of the accused persons to execute a bond of Kshs 5 million plus a surety of Kshs 2 million and to deposit cash bail of Kshs 1 million in court. In **Reuben Maramben Lemunyete & Others v R (supra)** the court, after considering the personal circumstances of the parties, granted terms ranging from bonds, with sureties of similar amounts, of Kshs 5 million to Kshs 500,000 and cash bail ranging from Kshs 2 million to Kshs 200,000. In **ACEC Revision No. 7 of 2019- Moses Kasaine Lenolkukal v R**, the court directed that the accused may be released on a bond of Kshs 30 million with a surety of the same amount or cash bail of Kshs 10 million.

42. We are in familiar, yet uncharted territory, when it comes to corruption and anti-corruption prosecutions. We are familiar with corruption because, as this court observed in the cases of **Lenolkulal** and **Lumenyete**, it wreaks havoc on our society and economy and on the needs and rights of citizens. We are, however, in uncharted territory because the recent past has probably seen the first serious and concerted effort to deal with it and ensure that those who perpetrate it are brought to justice. This is where the public interest consideration and the need not to diminish public confidence in the administration of justice that the Chief Magistrate in this case spoke of come in. Yet, these considerations must be balanced with the constitutional right of an accused person to bail, which is linked to his or her constitutional right to be presumed innocent.

43. In the circumstances, in order to balance these important yet competing considerations but in the absence of any averments with respect to the personal circumstances of the applicants, I will exercise discretion and revise the terms of bail and bond set by the trial court as follows:

1. The 1st, 2nd, 3rd, 4th 7th, and 8th accused persons namely Mohammad Abdalla Swazuri, Emma Muthoni Njogu, Tom Aziz Chavangi, Salome Ludenyi Munubi, Francis Karimi Mugo and Catherine Wanjiru Chege shall each be released on a bond of Kshs 15 million with one surety of a similar amount or cash bail of Kshs 7 million;

2. The 12th accused, Samuel Rugongo Muturi shall be released on a bond of Kshs 7.5 million with one surety of a similar amount or cash bail of Kshs 3 million;

3. The 16th accused, Sostenah Ogero Taracha, shall be released on a bond of Kshs. 5 million with one surety of a similar amount or cash bail of Kshs 1.5 million;

4. The 6th, 13th, and 14th accused persons, Lilian Savai Keverenge, Evahmary Wachera Gathondu and Michael George Onyango Oloo shall each be released on a bond of Kshs 2.5 million with one surety of a similar amount or cash bail of Kshs 750,000.

44. The bond approvals in this matter shall be done before the Chief Magistrate's Anti-Corruption Court seized of ACEC No. 6 of 2019, and any applications in respect of the orders made in this ruling shall be made before the same court.

45. The other terms set by the Chief Magistrate's Court in the ruling dated 23rd April 2019 shall remain in force.

46. Orders accordingly.

Dated Delivered and Signed at Nairobi this 2nd day of May 2019

MUMBI NGUGI

JUDGE